IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 11 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHEMABHAI DEVABHAI DABHI SALAT

Versus

STATE OF GUJART

Appearance:

1. Criminal Revision Application No. 11 of 2002

MR PN BAVISHI for Petitioner No. 1

MR B D Desai, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 22/01/2002

ORAL JUDGEMENT

The present criminal revision application has been filed under section 397 read with section 401 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), challenging the judgment and order in Criminal Appeal

No.31/95 recorded by the learned Addl.Sessions Judge, Sabarkantha at Himatnagar on 3.1.2002 confirming the judgement and conviction order dated 7.6.1995 recorded by the learned Judicial Magistrate First Class, Sabarkantha, Himatnagar in criminal case No.308/93, under which the learned Magistrate convicted the present petitioner for offence punishable under section 420 of IPC and sentenced him to suffer S.I. for two years. The petitioner was also directed to pay a fine of Rs.1000/-, in default of payment of fine, he was directed to further undergo S.I. for 2 months.

2. The facts leading to this Revision Application may be briefly stated as follows:

The original informant had filed the aforesaid FIR against the petitioner stating that the petitioner had approached the informant about four five days before 30.5.92 and had given a small golden coin. The petitioner represented to the informant that similar golden coins were found when some digging was undertaken. That he wanted to dispose of the same and, therefore, the said coin was given to the informant. Thereafter on 30.5.1992, the petitioner again approached the informant with 382 coins of yellow colour. The informant was induced to pay a sum of Rs.44,500/- for those coins. Accordingly, the informant parted with the said amount in favour of the petitioner and the petitioner parted with those coins in favour of the informant. Thereafter, it was noticed that those coins were brass coins and not golden and, therefore, FIR as aforesaid was filed by the informant against the petitioner for the said offence and for other offences.

3. After investigation, the investigating Police Officer submitted charage sheet. Charge was framed and at the end of the trial, the petitioner was convicted and sentenced as above. Feeling aggrieved by the said judgment and order of the learned JMFC, Himatnagar, the petitioner preferred Criminal Appeal No.31/95 unsuccessfully.

4. Feeling aggrieved by the said judgment and order of the learned Addl.Sessions Judge, Himatnagar, the petitioner has preferred this Revision Application before this Court. It has been contended here that there was no material to show that the petitioner had cheated the informant, that there was no material to show that the petitioner had represented that he had golden coins with him. That there is no material to show that the coins given by the petitioner to the informant were not golden

coins and were fake or brass coins. That there is no evidence that the petitioner had cheated the informant and hence the lower court committed serious illegality in convicting the petitioner. It is, therefore, prayed that the present revision application be allowed and the two judgments and orders of the two courts below be set aside.

5. Rule was issued. Mr B D Desai, learned APP appears on behalf of the State. I have heard the learned Advocates for the parties and have perused the papers of this revision application.

6. Mr P N Bavishi, learned Advocate for the petitioner has argued that though there is a case advanced by the informant and the prosecution before the trial court and before the appellate court that the petitioner had initially given a genuine golden coin to the informant and subsequently given him fake coins or brass coins with a representation that they were genuine golden coins, there was no material to show before the trial court that the coins subsequently given by the petitioner to the informant, were not golden coins or they were brass coins.

7. He has taken me through the evidence on record in order to substantiate the said arguments. Now the first witness is the informant himself, who has given details as to how the incident took place. There is nothing on record from his evidence to show that the coins subsequently given by the petitioners were brass coins or that they were not golden coins. However, the petitioner is not found to be an expert Goldsmith. It is not proved on record that the coins were tested in presence of some independent persons. There is no evidence about the result of such a test carried out by the petitioner to find out that the coins were genuine or ingenuine and, therefore, there is no material to show from the evidence of this witness that 382 coins subsequently presented by the petitioner to the informant were fake or that they were not golden coins.

8. Then there is evidence of PW 2-Baldevji, who was panch witness in whose presence the cloth bag was produced by the informant before the Investigating Officer and the said cloth bag contained those coins. It is not brought on record from his evidence that these coins were tested by an expert Goldsmith and it was noticed that the coins were not golden coins. This witness has not supported the prosecution. Even the Investigating Officer does not say that these coins were

actually tested and it was found that they were not golden coins. Therefore, evidence of this witness does not go to say that those 382 coins were fake coins. Then, there is evidence of Ishwarbhai at exh.43. It is noticed that he was called at Naroda on 21.8.1992 by Himatnagar police station and in his presence the petitioner was identified by the informant. This was not a test identification parade in presence of an Executive Magistrate. Even if we accept the evidence of this witness and even if we accept that the informant had rightly and correctly identified the petitioner, then also the matter does not lead to conviction of the present petitioner. Witness No.4- Kamlesh at Exh.45 is also a panch witness. He was also called as panch witness on 23.9.1992 at Himatnagar police station at 11 a.m. In his presence, the petitioner had shown the shop of the informant where the aforesaid dealing is said to have taken place. This does not prove that the coins presented by the petitioner to the informant were fake coins.

9. P.W. 5 Sukesh R Doshi at Exh.47 is the brother-in-law of the informant and he was present when the above dealing took place between the petitioner and the respondent. However, he also does not say anything about the fake coins. It is not the case of the prosecution that the petitioner had admitted in presence of these two witnesses that the coins presented were fake. Therefore, even this witness does not go to prove that the coins presented to the informant by the petitioner were fake coins or were brass coins. No other witness has been examined. Even the Investigating Officer does not appear to have been examined. It is not the case of the prosecution that the Investigating Officer has got the coins tested. It is not the case of the prosecution that even the informant got the coins tested through any expert in presence of someone. The net result is that there is no evidence on record to show that the coins in question were fake coins or brass coins. In that view of the matter, when the coins in question are not found to be brass coins, it cannot be said that the petitioner had cheated the informant by stating that the coins are golden and under the said pretext the informant was induced to part with an amount of 44,500/in favour of the petitioner. This evidence is not there on record and yet two courts below had convicted the petitioner under the pretext that those coins were brass coins and not golden coins. This means that the two courts below have recorded finding without any evidence on record. It is not in dispute that the petitioner has filed this Revision Application and the

finding of fact cannot be disturbed lightly by this Court since this Court is not exercising powers of Appellate Court. At the same time, when the finding is based on no evidence, the court has to interfere with the said finding of fact. In the present case, we find that the two courts below have found that the coins presented by the petitioner to the respondent were fake coins or were brass coins or were not golden coins. In fact, there is absolutely no evidence to show that these coins were fake coins or were brass coins or were not golden coins. This means that the above findings recorded by the two courts below are without any record or material or without any evidence on record. When the finding is recorded without any evidence on record, it has to be held to be perverse finding or illegal finding. When the finding is illegal and perverse, it is the duty of this Court to interfere with the said finding and to quash and set aside the said finding. Once the finding is quashed and set aside and once it is found that the coins supplied by the petitioner to the respondent were not proved to be fake coins or brass coins, no offence of cheating can be said to have been committed by the petitioner. As said above, the main allegation of the informant against the petitioner is that the informant was induced to part with a sum of Rs.44,500/- on saying that he would supply golden coins but the informant was cheated by the petitioner when the petitioner had supplied brass coins instead of golden coins. As said above, the coins supplied were not proved to be brass or fake and it was not proved that they were not golden. In that case, the offence of cheating is made out. For the above reasons, the judgments and orders of the two courts below cannot be sustained and, therefore, the said judgments and orders are required to be set aside by allowing this revision application.

10. For the foregoing reasons, this revision application is allowed. The judgments and orders of the two courts below are quashed and set aside. The petitioner is ordered to be acquitted of the offence punishable under section 420 of IPC and, therefore, he shall be set at liberty if no longer required in any other case. Fine, if any, paid be refunded to the petitioner. Rule is made absolute to the aforesaid extent.

22.1.2002 [D P Buch, J.]
msp